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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1310

STA-RITE INDUSTRIES, INC., a corporation,
Petitioner,

VERSUS

HOMER JOHNSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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In the
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STA-RITE INDUSTRIES, INC., a corporation,
Petitioner,

VERSUS

HOMER JOHNSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on December 30, 1971, and the order of the Court entered February 29, 1972.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Western District of Oklahoma refusing to apply Oklahoma law of partnership is printed in Appendix B hereto and is not reported. The opinion of the United States District Court for the Western District of Oklahoma denying petitioner's motion to open proceedings, take additional testimony and amend its opinion and enter judgment for the plaintiff is printed in Appendix C and is not reported. The

opinion of the Tenth Circuit Court of Appeals, which sustained the judgment of the District Court for the Western District of Oklahoma, is printed in Appendix A hereto and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on December 30, 1971. The Tenth Circuit Court of Appeals denied petitioner's Motion for Rehearing, for withholding decision until identical state case finalized and suggestion for hearing *en banc* on February 29, 1972. The Tenth Circuit Court of Appeals stayed its mandate 30 days or until April 10, 1972, on March 10, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

THE QUESTIONS PRESENTED

1. It is the duty of either the Federal District Court as well as the Court of Appeals to ascertain, apply and follow the state law where it is the substantive rule of decision.

2. It is the duty of either the Federal District Court or the Court of Appeals to ascertain and apply the state law where it is the substantive rule of decision even though it has not been expounded by the highest state court and is expounded subsequent to the earlier opinion of the Federal Court but prior to the judgment.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The statute involved is 28 U.S.C. § 1652—state laws as rules of decision:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT

Petitioner, a corporation, brought suit in the United States District Court for the Western District of Oklahoma against the respondent, Homer Johnson and Monte Bunch, formerly co-partners, doing business as Central Pump & Supply Company for an open account in the amount of $18,125.61. Monte Bunch was subsequently found in default and the respondent, Homer Johnson, generally denied the allegations of the plaintiff including the allegation that respondent, Homer Johnson, had ever been in partnership with Monte Bunch. This Petition for Writ of Certiorari is most unusual in that an identical case developed in the Oklahoma courts simultaneously with this one. Its decisions were timely called to both Federal courts below and both ignored them!

Another creditor instituted suit in state court and obtained judgment against the same defendants for merchandise delivered during the same periods. Before the case in the trial court below was final this was discovered by plaintiff and timely motion was made pertaining thereto. Both

state and federal cases were appealed. Before the decision of the Circuit Court below was final the Oklahoma Court of Appeals acted and again timely motion was filed by plaintiff.

A. Federal District Court

The case was tried on two separate days. Petitioner produced five "live" witnesses, five witnesses by deposition, one witness by interrogatories, five requests for admissions and answers of the respondent, Homer Johnson, and interrogatories to the respondent, Homer Johnson, and his answers. Thirty exhibits were also introduced by petitioner.

The respondent, Homer Johnson, relied solely upon his own testimony, that of his former co-partner, Monte Bunch, and limited testimony of one other witness as well as introducing nine exhibits.

The court below, at the conclusion of the trial, states "* * * this is a very close question, gentlemen, extremely close * * * it is going to be a close call, however I go. I recognize this. As I have indicated, Johnson got awfully deep in this operation * * *" (R. 183).

In the opinion holding for the respondent, Homer Johnson, the court states, "The Court acknowledges that this is a close and difficult call * * *. It is no doubt likely that Johnson's activities in supplying money for the company and taking an interest in the operation of the company gave hope and encouragement to the plaintiff and its employees that they could look to Johnson for their account, * * *" (R. 27-28).

Many, many facts reflecting respondent's actual operation of the debtor business were undisputed. The court's findings below include many facts favorable to petitioner (R. 19). The exhibits, interrogatories and admissions were not disputed. The disputed testimony revolves around positive testimony of actual statements of partnership made by or in the presence of the respondent, Homer Johnson, to diverse people at different times (R. 20).

Petitioner states that even if *all disputed* issues are determined adversely (as they were below) proof of both partnership by law and partnership by estoppel was made herein when Oklahoma law is applied, as expounded not only in the companion state case but in other late Oklahoma law.

On January 7, 1970, the Petitioner filed its motion to open proceedings, take additional testimony and amend its opinion and enter judgment for the plaintiff. This motion brought to the Federal District Court's attention the then-styled case of *The Plastex Company* v. *Homer Johnson et al.*, Case No. 13,312 in the District Court, Custer County, State of Oklahoma, which had just been decided by the Oklahoma trial court. The Oklahoma Court of Appeals affirmed this decision with opinion styled *Johnson* v. *Plastex Co.*, Case No. 43,934. The opinion is printed in Appendix D and is reported in Volume 42 of the Oklahoma Bar Journal at page 3317. The legal question of partnership in the case at bar and in *Johnson* v. *The Plastex Co.*, 42 O.B.A.J. 3317 (Dec. 7, 1971) is *identical*.

B. **Court of Appeals**

The Court of Appeals erroneously affirmed the Federal District Court and has denied Petitioner's Motion for Rehearing, for Withholding Decision Until Identical State Court Case Finalized and Suggestion for Rehearing En Banc. The Court of Appeals has stayed its mandate for 30 days or until April 10, 1972.

The legal question of partnership is identical in the state court action and this case. The defendant is identical. The defendant introduced the same defense in each. Virtually identical facts were introduced (including those offered below as newly discovered evidence from the transcript of the *Plastex* case.) Both plaintiffs were in identical posture as creditors who sold to Central Pump (the partnership) at the same time.

Consequently the Court of Appeals for the Tenth Circuit:

(1) Erred in sustaining the erroneous refusal of the trial court to accept the latest state court ruling on the subject (as well as newly discovered evidence from that action).

(2) Erred in not itself accepting the latest state court decisions.

(3) Further, the Court of Appeals inadvertently overlooked the fundamental law in Oklahoma that those who intend to incorporate are to be treated as partners until they do incorporate if they engage in the business, and also sustained the erroneous application of the law of requisite knowledge of the existence of a "silent" partner made by the court below, which is contrary to the Oklahoma law as expounded in the companion state court case.

REASON FOR GRANTING THE WRIT

This petition raises substantial and important questions concerning the duty of Federal Courts to follow the State's rule of decision. 28 U.S.C. § 1652. The basic law in this regard is this Court's decision of *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), as well as 28 U.S.C. § 1652.

Both Federal Courts below have refused to apply the more recent Oklahoma case law when it was timely presented from the most recent case wherein facts and parties were virtually identical. The Federal Courts clearly have that duty. This Court has so stated.

> —*West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139 (1940), reg's (A 6th, 1939), 108 F.2d 347;
>
> *Six Companies of California* v. *Joint Highway Dist. No. 13, etc.*, 311 U.S. 180, 61 S.Ct. 186, 85 L.Ed. 114 (1940), reg's (A 9th, 1940), 110 F.2d 620;
>
> *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464, 61 S.Ct. 336, 85 L.Ed. 284 (1940), reg's (A 8th, 1940), 109 F.2d 874;
>
> *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169, 61 S.Ct. 176, 85 L.Ed. 109, reg's (A 3rd, 1939), 108 F.2d 521.

The decision of the Tenth Circuit in the case at bar overlooks the rule of law in Oklahoma that where the parties associate themselves together for the purpose of organizing a corporation, and fail to do so, they thereupon become partners to the extent of their interest (*Maple* v. *Long Bell Lbr.*, 229 Pac. 793), even though there was a spe-

cific finding in the court below; which was adopted here, that the respondent, Homer Johnson, and Monte Bunch. associated themselves for the purpose of forming a corporation. The association being a period of many months prior to any attempt on the respondent's part to form a corporation, and during which period the account on which this action was brought accrued. Oklahoma law (as well as in other jurisdictions) makes them partners. The case of *Maple* v. *Long Bell Lbr., supra*, is cited favorably by the Oklahoma Court of Appeals in its opinion, Appendix D, hereto.

Clearly, the Federal Court's failure to follow the Oklahoma law as expressed by the Oklahoma Supreme Court and the Oklahoma Court of Appeals is clearly shown in this case. Also, it violates the expressions of the Tenth Circuit as laid down in its decision of *Clay* v. *Sun River Mining Company*, 302 F.2d 599 (10th Cir. 1962), holding the Federal Court bound by an Oklahoma trial court decision.

The action involved an Oklahoma District Court's determination that its prior judgment was void. The court stated at page 602:

> "In our determination of the question before us, we must also give consideration to the judgment of December 19, 1958, in the District Court of LeFlore County, wherein that court expressly held the September 5 judgment of the same court to be void upon its fact as shown by the judgment rolls.
>
> "This Court, in B. F. Goodrich Company v. Hammond, 10th Cir., 269 F.2d 501, 506, states:
>
> "* * * [W]here jurisdiction rests solely on diversity of citizenship and there is no controlling decision by the highest court of a state, a decision by an inter-

mediate court should be followed by the Federal Court, absent, as here, of convincing evidence that the highest court of the state would decide otherwise.'

"The Supreme Court of the United States has had occasion to decide the very issue now under consideration. See Fidelity Union Trust Co. v. Field, 311 U.S. 169, 177, 178, 61 S.Ct. 178, 85 L.Ed. 109; Six Companies of California v. Joint Highway District No. 13, 311 U.S. 180, 188; 61 S.Ct. 186, 85 L.Ed. 114; West v. American Tel. & Tel. Co., 311 U.S. 223, 227, 61 S.Ct. 179, 85 L.Ed. 139; Stoner v. New York Life Insurance Co., 311 U.S. 464, 468, 61 S.Ct. 336, 85 L.Ed. 284.

"In Field, supra, 311 U.S. 169 at 177, 61 S.Ct. at 178, 85 L.Ed. 109, the court stated: 'The Highest state court is the final authority on state law * * *, but it is still the duty of the federal courts, where the state law supplies the rule of decision (Judiciary Act of 1789, § 34; R.S. 721, 28 U.S.C.A., 725), to ascertain and apply that law even though it has not been expounded by the highest court of the State. See Ruhlin v. New York Life Insurance Co., 304 U.S. 202, 209 (58 S.Ct. 860, 82 L.Ed. 1290). An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a Federal Court in deciding a state question. We have declared that principle in West v. American Telephone & Telegraph Co.' (311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139)."

It is abundantly clear under this Court's decisions and the 10th Circuit's rule in *Clay* v. *Sun River Mining Company, supra,* the Federal District Court erred in denying the Petitioner's timely motion to reopen based on the judgment and decision rendered in the Oklahoma District Court

case of *Plastex Company* v. *Homer Johnson and Monte Bunch d/b/a Central Pump and Supply Company, a partnership*, Case No. 13,312, District Court—Second Judicial District of Custer County, Oklahoma. The similarity of parties and the identity of issues in the cases made the rule of *Clay* v. *Sun River Mining Company, supra,* clearly controlling. The 10th Circuit's failure to consider *Johnson* v. *Plastex Company, supra,* compounds the error.

The Federal District Court specifically found, as noted by the 10th Circuit, there was an intent to organize a corporation in that respondent "advanced money and assisted in the business on this basis. The Federal Courts overlooked the prevailing law in Oklahoma that the parties thus become partners.

It is respectfully submitted the Federal Courts setting in Oklahoma must defer to the Oklahoma Court of Appeals decision on the identical question of the partnership liability of the respondent, Homer Johnson, and the application of the Oklahoma law is applied by the Oklahoma Court of Appeals as a more specific reflection of the Oklahoma law than accepting the determinations of state law made by the Federal District Court; where said Federal District Court admittedly was in doubt thereon.

It is further respectfully submitted that under this erroneous Federal Court interpretation of the Oklahoma law it would be virtually impossible to prove a partnership in law or by estoppel of an individual who wished to avoid the consequences of his actions.

Also significant is the Federal Court's oversight of the landmark case in Oklahoma law, *Maple* v. *Long Bell Lumber Co., supra.*

The decision of the Federal Courts, in this case, is a significant deviation from *Erie* v. *Tompkins, supra; West* v. *American Telephone & Telegraph Co., supra; Six Companies of California* v. *Joint Highway Dist. No. 13, etc., supra; Stoner* v. *New York Life Ins. Co., supra; Fidelity Union Trust Co.* v. *Field, supra,* and the Tenth Circuit's own decision in *Clay* v. *Sun River Mining Company, supra.*

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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April, 1972

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit
Dec. 30, 1971
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER 1971 TERM

STA-RITE INDUSTRIES, INC., a corporation, Plaintiff-Appellant,	)	
vs.	)	No. 301-70
HOMER JOHNSON, Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA
(D.C. No. 68-489)

Norman E. Reynolds, Oklahoma City, Oklahoma, for Appellant.

Denver W. Meacham, Clinton, Oklahoma, for Appellee.

Before HILL, HOLLOWAY and DOYLE, Circuit Judges.

HOLLOWAY, Circuit Judge.

Appellant Sta-Rite Industries, Inc. (Sta-Rite) sued on an account of $18,125.61 for merchandise sold to Central Pump and Supply Company (Central) seeking recovery

from appellee Johnson and another defendant, Monte Bunch, on the theory they were both liable for Central's obligation as partners. Judgment was entered against Bunch, who was in default, and he has not appealed. However, judgment was entered in favor of Johnson and against the Sta-Rite company which appeals from that denial of recovery.

Sta-Rite claims that Johnson is liable for Central's obligation as a partner, arguing that (1) as a matter of law under the Uniform Partnership Act as adopted in Oklahoma, 54 O.S. 1961 § 201, et seq., Johnson was an actual partner; and (2) in any event, Johnson was estopped to deny the existence of the partnership and is liable under the estoppel provisions of the Act, 54 O.S. 1961 § 216. The case was tried to the Court whose findings and conclusions were stated in its Memorandum Opinion, ____ F. Supp. ____.

Appellant's contentions based on the proof favorable to Sta-Rite were essentially considered in detail and rejected in the Memorandum Opinion which states the facts fully.[1] We accept the District Court's determinations and will treat the issues and facts only briefly to deal with the arguments of Sta-Rite as addressed to us.

In essence the District Court found that Johnson and Bunch never became partners or intended to be partners; that the evidence failed to show their participation in profits

[1] On appeal Sta-Rite says that some additional proof was tendered in connection with a motion to re-open and that this evidence also shows that the findings were in error. The District Court's order denying Sta-Rite's motion to re-open, and other motions combined with it, discussed this proof. The order stated that the portion relating to proof of a contrary result in a separate State Court case was not an appropriate basis for re-opening and that the remainder of the proof was not such as would cause the Court to change its findings and conclusions. The motion to re-open was within the discretion of the Court, see Welch v. Grindle, 251 F.2d 671, 677 (9th Cir.), and we are satisfied there was no abuse of that discretion.

and losses; that Johnson was interested in getting into the business only as a corporation, and that he advanced money and assisted in the business on this basis; and that Sta-Rite had failed to prove an actual partnership. It was further found that while the question was close and difficult, Sta-Rite had failed to carry its burden of establishing partnership liability of Johnson by estoppel. We are satisfied that the record amply supports the findings and conclusions and affirm.

In reviewing the findings Sta-Rite argues that the clearly erroneous rule under Rule 52(a) F.R.Civ.P. should be applied less stringently since the District Court viewed the case as close and because much of the proof was by documentary evidence and depositions, relying on Mid-Continent Casualty Co. v. Everett, 340 F.2d 65 (10th Cir.), and similar cases. However, in determining the factual issues the District Court relied on the testimony of Johnson, Bunch and an attorney handling incorporation papers later for them, and evaluated also the testimony of several witnesses who appeared in person for Sta-Rite, along with the depositions and exhibits. Therefore, we cannot agree that there is any substantial relaxation of the provisions of Rule 52(a) which enjoin us to give due regard to the opportunity of the trial court to judge the credibility of the witnesses. See United States v. U. S. Gypsum Co., 333 U.S. 364, 394-395. Moreover, on the evaluation of the whole record we are convinced that the findings are amply supported. Even where the record is wholly documentary our scope of review is enlarged only to the extent that no regard need be given to the opportunity of the trial court to observe witnesses; in such cases we nevertheless do not disturb the findings unless we have a definite and firm conviction that a mistake has been made. Mid-Continent Casualty Co. v. Everett, supra at 70, in accord with the general rule respecting the trial court's findings. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123; and United States v. U. S. Gypsum Co., supra at 394-395.

As to partnership as a matter of law, Sta-Rite urges that the District Court erred in strictly applying Dowdy v. Clausewitz, 361 P.2d 288 (Okla.), which for formation of a partnership requires intent, participation in profits and losses, and such a community of interest, as far as third persons are concerned, as enables each party to make contracts, manage the business and dispose of the property. Sta-Rite instead urges that a less stringent standard for the creation of partnerships is illustrated by Oklahoma Company v. O'Neil, 440 P.2d 978 (Okla.), and Pfleider v. Smith, 370 P.2d 17 (Okla.). While the tests are stated differently in these subsequent cases dealing with joint ventures, the cases show no rejection of the basic requirements for a partnership as outlined in the *Dowdy* case. And even if a doubt is raised as to the partnership test applied in the *Dowdy* case, we should not undertake to settle such uncertainties in the Oklahoma law since we accept the determinations of State law made by the District Court here, which are not clearly in error. Douglas-Guardian Warehouse Corp. v. Jones, 405 F.2d 427, 428 (10th Cir.), Manville v. Borg-Warner Corp., 418 F.2d 434 (10th Cir.). Therefore, we accept the findings and conclusions of the District Court that under Oklahoma law an actual partnership was not shown.

In connection with the estoppel issue, as stated the District Court viewed the question as close and difficult. There was considerable proof that Johnson engaged in Central's business for several months; that he signed checks on Central's bank account; and that he paid certain of Central's smaller obligations himself. There was also testimony by a Dun and Bradstreet employee that Johnson said that he was a partner, and this information was stated in a credit report obtained by Sta-Rite. However, the District Court believed the testimony of Johnson that he never represented himself to be a partner, nor permitted this to be done. There was also testimony by a former Central employee that Bunch described Johnson as a partner in John-

son's presence without any objection by Johnson. As to this point the Court found that this representation was not repeated to Sta-Rite and that it could not have been relied on. On consideration of all the proof, including the testimony of Johnson and Bunch, it was found that Johnson never advised Sta-Rite or anyone that he was a partner. Again we feel the record sustains the ultimate findings against Sta-Rite on the estoppel issue and that there was no clear error in applying State law.[2]

AFFIRMED.

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[2] Sta-Rite argues that the District Court erred by applying the test for an estoppel as stated in Williams v. Jones, 324 P.2d 541 (Okla.), including the element of a false representation, instead of the partnership estoppel test stated in 54 O.S. 1961 § 216, which Sta-Rite says is less stringent. However, the Court found that there was no public representation of partnership made by Johnson, and that no partnership representation was otherwise made by Johnson to Sta-Rite. Since this premise for an estoppel was rejected by the Court, no problem as to the statute's interpretation is presented.

APPENDIX B

FILED
Dec. 19, 1969
REX B. HAWKS
Clerk, U. S. District Court
By GLADYS M. JONES,
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STA-RITE INDUSTRIES, INC., a corporation, Plaintiff,	)	
vs.	)	No. 68-489 Civil
HOMER JOHNSON AND MONTE BUNCH, formerly co-partners doing business as Central Pump and Supply Company, Defendants.	)	

MEMORANDUM OPINION

Plaintiff sues on an account with a balance due in the amount of $18,125.61 carried by it with Central Pump and Supply Company. Plaintiff sues Homer Johnson and Monte Bunch on the basis that they were formerly co-partners doing business as Central Pump and Supply Company. In support of its action, Plaintiff relies upon an actual partnership agreement between the said Defendants doing business as Central Pump and Supply Company and also that the Defendant Homer Johnson is estopped by his conduct to deny his partnership with Monte Bunch under said company name.

Defendant Monte Bunch, with reference to this account, is in default herein and judgment by default should be entered against him for the amount sued for herein. Defendant Homer Johnson denies that he was ever a partner

with Monte Bunch in Central Pump and Supply Company, also denies he is estopped to deny a partnership by his conduct as claimed by Plaintiff and denies any liability for the account sued on herein. The case was tried to the Court.

The evidence discloses that Monte Bunch formerly worked for the Plaintiff and did so until he entered business for himself as an individual at Clinton, Oklahoma, under the name of Central Pump and Supply Company. He rented a building for his company from the Defendant Homer Johnson. Bunch eventually got in arrears on his account with Plaintiff. He gave a check to Plaintiff on the account for a sizeable sum which was not honored due to insufficient funds. About this time, Bunch made certain overtures to Johnson, his landlord, with reference to his business venture and discussions were had with reference to Johnson getting into the business. Johnson borrowed money from his bank which was placed to the credit of Central Pump and Supply Company, a portion of which was immediately transmitted to the Plaintiff to cover the bad check and pay part of its account with Monte Bunch. Defendant Johnson did become involved in the general business affairs of Central Pump and Supply Company to the extent of spending some time nearly every day in the company office which was about one block from his regular business activity of running a Motel in Clinton, Oklahoma. On infrequent occasions he went into the field where the company was involved in certain irrigation work. He ordered and returned some supplies for and from Plaintiff. He signed some company checks, bought certain equipment and supplies from others on behalf of the company and did other things related to the business affairs of Central Pump and Supply Company. Eventually the company went out of business whereupon Johnson sold certain of its assets and applied the same to its obligations and even paid two small local obligations with his own personal funds.

Johnson claims that he was merely assisting Bunch in the business affairs of the company and was running er-

rands for Bunch; that Bunch actually lived in Amarillo, Texas, and did not spend too much time in Clinton; that Bunch became ill and was ill and unable to be about during the liquidation above mentioned which Johnson did at the specific request of Bunch. Johnson claims that the small local bills above mentioned were paid by him out of his own funds because they were local merchants and he felt they had a nuisance value to pay rather than to litigate with them over the question of his liability for the same. Other more sizeable company accounts presented to Johnson for payment were rejected by him, including the one in this litigation.

The evidence is in sharp conflict with reference to certain statements Plaintiff claims Johnson and/or Bunch made to the effect that Johnson was a partner of Bunch. One witness so testifying is a former employee of Central Pump and Supply Company who said that Bunch introduced Johnson as his partner which Johnson did not deny. Another is a former employee of Plaintiff who stated that in conversation with Johnson, he (Johnson) said he was a partner in the business. Dunn & Bradstreet ran a check on the company and issued a report as of June 1, which asserted that Johnson was a partner in the business. Johnson denies all of these claimed assertions against him and testified that at no time did he or anyone in his presence state that he was a partner with Bunch in Central Pump and Supply Company. Thus, the evidence is in direct conflict. It is the position of Johnson that while he was interested in getting into the business, he was only interested from the very first in doing this on the basis that the company be incorporated and that he be the majority stockholder. He positively asserts that at no time did he agree to be the partner of Bunch nor did he hold himself out as such. Another former employee of Central Pump and Supply Company, the bookkeeper, testified that she saw what she described as a written partnership agreement between Johnson and Bunch which Bunch let her see. However, she was

unable to testify that it was a signed document when she saw it. She testified she returned it to the files and never saw it again. She was unable to say that Johnson ever told her he was a partner, but she did testify that he was frequently in the office and spent much time in connection with the affairs of Central Pump and Supply Company. The Defendant introduced in evidence a signed agreement between Bunch and Johnson dated October 27, 1967, by which the two agreed to the incorporation of Central Pump and Supply Company which incorporation actually took place on November 11, 1967. At this time the company was in financial trouble. The former bookkeeper employee did not believe that this signed agreement to incorporate was the one she previously saw and described as a partnership agreement. The Defendant produced the attorney who prepared the signed agreement to incorporate who testified that he prepared the said agreement and knew nothing about a partnership between the parties.

In Oklahoma, a partnership is defined as an association of two or more persons to carry on as co-owners a business for profit. 54 Okl.St.Ann. 206. Rules for determining the existence of a partnership are set out in 54 Okl.St. Ann. 207.[1] This statute provides:

> "*Rules for determining existence of a parnership*
>
> In determining whether a partnership exists, these rules shall apply:
>
> (1) Except as provided by Section 16, [54 Okl.St. Ann. 216] persons who are not partners as to each other are not partners as to third persons.
>
> (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

---

[1] This statute and the statute cited previously were enacted in 1955 as a part of the Uniform Partnership Act.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) As a debt by installments or otherwise,

(b) As wages of an employee or rent to a landlord,

(c) As an annuity to a widow or representative of a deceased partner,

(d) As interest on a loan, though the amount of payment vary with the profits of the business,

(e) As the consideration for the sale of a goodwill of a business or other property by installments or otherwise."

Even though the above statute does not treat one way or another with the matter of the intent of the parties to form a partnership in determining the existence of an actual partnership, such would seem to be implicit from a consideration of such section and Section 206. The Oklahoma Supreme Court in a case decided after the Uniform Partnership Act was adopted but dealing with a partnership entered into before such passage stated the essential elements of a partnership to be:

(1) Intent of the parties to form a parnership,

(2) Participation in both profits and loss, and,

(3) Such a community of interest, as far as third parties are concerned, as enables each party to make contracts, manage the business, and dispose of the property. *Dowdy* v. *Clausewitz*, 361 P.2d 288 (Okl. 1961).

Intent, of course, in this instance involves the understanding or state of mind of Johnson and Bunch as to whether they were partners. Intent may be ascertained from conduct and circumstances. Both Johnson and Bunch testified that they did not at any time enter into or have the intent of entering into a partnership agreement. No written articles of co-partnership between Johnson and Bunch have been presented to the Court. There were no profits and none shared. In this connection, the Court finds that certain moneys paid to Johnson by company checks were to reimburse him for expenses paid by him on behalf of the company for travel and for supplies for the company purchased by him with his personal funds.

The burden of proving the existence of an actual partnership between Johnson and Bunch is upon the Plaintiff who claims such relationship and Plaintiff must do so by a preponderance of the evidence. From all the evidence and circumstances of the case, the Court finds and concludes that the Plaintiff has not carried his burden to prove an actual partnership between Johnson and Bunch by a preponderance of the evidence. The Court is of the opinion that Johnson was interested in getting into the business, but only as a corporation in which he would own a majority of the stock and he advanced moneys and assisted Bunch in the operation of his business on this basis. This is borne out by the testimony of Johnson and Bunch, the signed agreement to incorporate, the eventual incorporation under said agreement, the testimony of Johnson's banker that he discouraged Johnson about getting into the business as a partner and the testimony of the attorney who prepared the agreement to incorporate that he knew nothing about a partnership between Johnson and Bunch. The Court believes that the bookkeeper has confused the signed agreement to incorporate with what she believes were articles of co-partnership. It is quite significant that correspondence between Plaintiff and Central Pump and Supply Company in July 1967 (after Johnson borrowed money for the com-

pany) and as late as September, 1967, showed, "Monte Bunch d/b/a Central Pump and Supply Company" and Sales Tax Reports as late as November 1967 showed, "Central Pump and Supply Monte Bunch, owner." The Court does not believe that Johnson and Bunch ever became partners or ever intended to be partners in the business. The evidence fails to show any participation of Johnson and Bunch in the profits and losses of the company which supports the above conclusion of the Court.

But Oklahoma law provides for the creation of partnership liability of one who holds himself out to third persons as a partner, estopping him from denying the existence of a partnership although there is, in fact, no partnership. 54 Okl.St.Ann. 216.[2] This is the second position of the Plain-

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[2] "*Partner by estoppel*

(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation."

tiff to which the Court now turns. There are no reported cases under the above section of the statutes, but there are a number of Oklahoma cases decided prior to the statute dealing with partnrship by estoppel. Apparently, the estoppel is equitable and its essential elements are:

1. False representation to a person,

2. Made with actual or constructive knowledge of facts,

3. Such person being without such knowledge,

4. With intent that such representation be acted upon, and,

5. It was acted upon or relied upon by the person to whom made. 31 C.J.S., Section 67a; *Williams* v. *Jones*, 324 P.2d 541 (Okl. 1958).

The false representation relied upon by Plaintiff to establish a partnership by estoppel is its evidence that Johnson held himself out as a partner of Bunch or knowingly allowed Bunch to hold him out as such. Unless done in a public manner, such representation or holding out must have been communicated in some manner to the Plaintiff who must thereafter have relied thereon in selling supplies to the company. The alleged statement of Bunch to an employee of Central Pump and Supply Company that Johnson was his partner claimed to have been made in the presence of Johnson without his denial was not communicated to the Plaintiff according to the evidence and therefore, could not have been relied upon by the Plaintiff. It is also not sufficient to be held to have been done in a public manner. The alleged statement that Johnson was a partner, claimed to have been made to an employee of Dunn & Bradstreet, was not made or communicated to the Plaintiff but Plaintiff eventually received this information through its purchase of a Dunn & Bradstreet report on Central Pump and Supply Company. If Johnson told Dunn & Bradstreet that he was a partner, this could be a

representation that he was a partner made in a public manner. The alleged statements by Johnson that he was a partner claimed to have been made to an employee of Plaintiff would, of course, be communicated to Plaintiff. Johnson denies all such statements or representations that he was a partner. If this conflicting testimony about the statements or representations alleged to have been made to Dunn & Bradstreet and to an employee of the Plaintiff is resolved in favor of Plaintiff there is then evidence of communication to Plaintiff and reliance thereon as to some supplies, but not all sued for herein, which were thereafter sold and shipped to Plaintiff.

Here, again, the Court finds and concludes from the evidence that the Plaintiff has failed to carry its burden of proof to establish partnership liability of Johnson by estoppel. The Court acknowedges that this is a close and difficult call under the evidence but recognizing the same as a factual question, the Court resolves the controversy in favor of Johnson. The date of the Dunn & Bradstreet report stating that Johnson was a partner was approximately three weeks before Johnson obtained money from his bank and placed the same to the credit of Central Pump and Supply Company. It is not deemed likely that Johnson would have represented himself to be a partner at any time before he made money available to the company. The Court believes the testimony of Johnson regarding this report. The employee of Plaintiff who claims that Johnson told him he was a partner has an interest in supporting the propriety of his business dealings with the company even though he is no longer employed by the Plaintiff and it is apparent to the Court that employees of the Plaintiff were inclined to do all possible to help Bunch along as a former fellow employee trying to get started in business on his own. The acts of Johnson in borrowing money from his bank for the benefit of the company, making his financial statements available and signing company checks is not inconsistent with his position that he was interested in getting into the

business but only on the basis of the company being incorporated. The Court concludes that the fact of the bank papers being carried as H. F. Johnson d/b/a Central Pump and Supply Company was the act of the bank and not Johnson. Moreover, such method was erroneous for it overlooked Bunch entirely. Also, these papers did not come to the attention of Plaintiff and afford reliance to it. Any public recording of any of these papers was the act of the bank and not Johnson. It is, no doubt, likely that Johnson's activities in supplying money to the company and taking an interest in the operation of the company gave hope and encouragement to the Plaintiff and its employees that they could look to Johnson for their account, but I do not believe that Johnson ever advised them or anyone else that he was a partner of Bunch in the company and thereby liable for its accounts. Sound business procedure for the Plaintiff to have followed in the circumstances of this case would have been to definitely ascertain the liability of Johnson for its supplies and do so in writing. After having seen and heard the witnesses, except those whose testimony came in by deposition, the Court reaches these factual findings and conclusions after careful deliberation.

Accordingly, judgment by default should be entered against Bunch for the amount sued for herein and judgment should be entered in favor of Johnson and against the Plaintiff on the issues between them. Counsel will confer and present an appropriate judgment or judgments to the Court for signature and entry herein.

Dated this 19th day of December, 1969.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX C

FILED
Mar. 26, 1970
REX B. HAWKS
Clerk, U. S. District Court
By VERA EDDLEMAN
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STA-RITE INDUSTRIES, INC., a corporation, Plaintiff,	)	
vs.	)	No. 68-489 Civil
HOMER JOHNSON AND MONTE BUNCH, formerly co-partners doing business as Central Pump and Supply Company, Defendants.	)	

ORDER

Upon consideration of Plaintiff's Motion to Open the Proceedings, Take Additional Testimony and Amend its Opinion and Enter Judgment for the Plaintiff and the briefs in support of and in opposition to the Motion, the Court finds that the Motion should be denied.

The Motion and supporting briefs merely reargue the case and present nothing not previously considered by the Court except the surprising request that the Court reopen and receive in evidence and consider the jury finding of an actual partnership between Johnson and Bunch in a state court proceeding between Johnson and a different plaintiff, which case is not final but on appeal to the Oklahoma Supreme Court. It would be no more appropriate for this Court to change its findings and conclusions herein because of said jury determination than it would be for that determination to be changed because of this Court's

decision. We are both triers of the facts presented to us and it would not be proper for this Court to reopen the case to consider the result reached by a jury in another case under the evidence presented therein. The other claimed newly discovered evidence mentioned by Plaintiff is not such as would cause this Court to change its findings of fact and conclusions of law and decision, as set forth in its Memorandum Opinion of December 19, 1969.

Plaintiff's arguments about the applicable law of this case are not convincing. There is no particular problem about the law involved in this litigation. Plaintiff has the burden to prove by a preponderance of the evidence either an actual partnership between Johnson and Bunch or a partnership by estoppel as to Johnson. Different legal principles apply to each theory as recognized and discussed in the Memorandum Opinion of the Court. The law is relatively clear but essentially this case must be decided on factual determinations from the evidence presented with the burden of proof being on the Plaintiff. The Court is satisfied with its determination that the Plaintiff has failed to carry this burden to show by a preponderance of the evidence either an actual partnership between Johnson and Bunch or to establish a partnership by estoppel against Johnson. These are the Court's factual determinations for the reasons set out in the Memorandum Opinion reached under legal principles also set out therein and believed to be correctly understood and applied by the Court.

Plaintiff's Motion is, therefore, denied this 26th day of March, 1970.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX D

(Division No. 2)

JOHNSON v. THE PLASTEX CO.
No. 43934. Dec. 7, 1971.

(This Opinion Not to Be Considered as Precedent or Authority and Not for Publication in the Official Reporter)

Appeal from District Court, Custer County; Charles M. Wilson, Trial Judge.

Affirmed.

Meacham, Meacham & Meacham, Clinton, for plaintiff in error.

John W. Donley, Weatherford, for defendant in error.

BACON, J. Plaintiff in error, Homer Johnson, was defendant in the trial court and appeals an adverse jury verdict in favor of plaintiff below, The Plastex Company, a division of Vistron Corporation, a corporation. The parties will be referred to as they appeared in the trial court.

The record shows plaintiff sold "goods, wares and merchandise" to a "Central Pump and Supply Company" of Clinton, Oklahoma, between March 27, 1967 and October 23, 1967, invoicing for the sum of $9,968.91. After receiving about $2,500 in payments, a balance of $7,598.78 remained unpaid. Plaintiff filed suit for the balance naming "Homer Johnson and Monte Bunch, d/b/a Central Pump and Supply Company, a Partnership" as defendants. Service was had upon Johnson but not on Bunch who was in Amarillo, Texas. Defendant Johnson filed a verified denial and the cause proceeded to trial by jury which resulted in a judgment for plaintiff for the unpaid balance. Defendant appeals asserting two propositions of error.

Defendant's first proposition reads:

"There is no evidence to support the verdict and judgment."

The argument advanced by defendant under this proposition is, in substance, that plaintiff's proof was insufficient to show defendant was a partner and thus liable with Bunch for the debts created. It is undisputed that defendant later incorporated "Central Pump and Supply" on November 10, 1967, and owned fifty-one per cent of the stock.

Whether or not a partnership existed under the evidence was properly a question for the jury to determine. Carey, Lombard, Young & Co. v. Huckaby, 186 Okl. 685, 100 P.2d 894 (1940).

In reviewing the evidence in a case as the one before us if there is sufficient evidence to support the judgment, that judgment will be affirmed, and we will not weigh the evidence. Here, we find there is sufficient evidence in the record to support a finding that defendant was a partner in "Central Pump and Supply" during the period the items were sold by plaintiff. Title 54 O.S. 1961 §206 contains the definition of a partnership, and reads:

"(1) A partnership is an association of two or more persons to carry on as co-owners a business for profit."

The trial court, among other things, instructed the jury in Instruction No. 6 as follows:

"One of the issues in this case is whether Homer Johnson and Monte Bunch were at the time involved in this case partners.

"Persons who join together or agree to join together in a business or venture for a common benefit each contributing property, money or services to the business or venture having a community of interest in any profits, are partners."

We find Instruction No. 6 adequately apprises the jury of the definition of partnership.

We further find there is sufficient evidence in the record to support a finding by the jury that a partnership existed all during the time plaintiff shipped the items from March 27, 1967, until October 23, 1967. The evidence shows a bank signature card for "Central Pump and Supply" dated March 3, 1967, which carried defendant's signature along with Bunch's, even though defendant urges he did not sign the card until June of 1967. The evidence further shows that "Central Pump and Supply" was housed on property owned by defendant and that defendant loaned Bunch $8,000 in June of 1967 without requiring any collateral for the "loan." There is a letter requesting credit addressed to plaintiff signed by both defendant and Bunch, dated June 20, 1967, with a financial statement attached showing defendant's assets and liabilities. A "Security Agreement" to a bank dated June 20, 1967, and showing the debtors to be "H. F. Johnson d/b/a Central Pump and Supply" was signed by defendant only, as were later security agreements. We find this and other evidence in the record sufficient to support the judgment of the trial court.

The fact plaintiff may have sold goods to a partnership in ignorance of the existence of a "silent" partner will not prevent recovery for the goods sold. Mapel *v.* Long-Bell Lumber Co., 103 Okl. 249, 229 P.2d 793 (1924). The fact plaintiff was unaware of some of the above-listed transactions has no bearing on the case, and defendant's argument to this effect is without merit. It would be rather awkward in the business world if a seller, to assure himself of payment, had to inquire as to who all owned or had an interest in the purchase aside from a party making the actual purchase.

Defendant's second proposition of error reads:

"The court erred in giving Instructions Nos. 1, 4 and 6."

Defendant complains of a portion of Instruction No. 1 and all of No. 4, which read as follows:

> "No. 1 (GIVEN AT THE BEGINNING OF THE TRIAL)
>
> . . . .
>
> "When you determine the facts that you believe to be more probably true than not true you will then determine the verdict you must render under the instructions that will apply the law to the facts so determined. . . ."
>
> "No. 4 MEANING OF BURDEN OF PROOF
>
> "In a civil case in court, such as this one, there are requirements as to which party is required to prove to you certain things. This is referred to as 'burden of proof.'
>
> "When I say the party has the burden of proof on any proposition, or use the expression 'if you find,' or 'if you decide,' I mean you must be persuaded, considering all the evidence in the case, that the proposition on which such party has the burden of proof is more probably true than not true."

Defendant argues "these instructions represent a departure from the traditional and time-honored requirement that a litigant who has the burden of proof must prove his contentions by a preponderance of the evidence." We agree such instructions were a departure from those traditionally given in Oklahoma. However, we cannot agree with defendant that there is a "traditional and time-honored requirement" that a court must use the exact wording "by a preponderance of the evidence," or any other stereotype language. It is not only traditional but also a law in Oklahoma that a court may choose its own language and form when instructing a jury, providing it correctly states the principles of law in language and form so persons of ordi-

nary understanding can comprehend the full meaning thereof. Campbell v. Breece, 134 Okl. 266, 274 P. 1085 (1928). Instructions by their very nature are communications between the court and the jury, oftentimes containing language, thoughts and principles foreign to the jurors. It would therefore follow that the simpler the language used, the easier it would be for the jurors to understand and follow the instructions. In the present case, the trial judge was obviously attempting to accomplish this very task and we believe he succeeded. He communicated with the jury in language that was not only understandable to them, but also correctly stated the law. One wonders what the various expressions found on the faces of jurors mean when listening to that portion of the instructions wherein language is found using such legalistic terms as "preponderance of the evidence." Even when lawyers are asked what is meant by the phrase "preponderance of the evidence," one does not receive identical answers. However, if there is a general consensus among lawyers, it would probably be that "preponderance of the evidence" means "more probably true than not true," which is the exact language used by the trial court in the present case.

In reviewing instructions the Supreme Court of Oklahoma in Cramer v. Osteopathic Hospital Founders Association, Inc., Okl., 383 P.2d 218 (1963), quoting from Commonwealth Life Insurance Company v. Gay, Okl., 365 P.2d 149, 153, said:

> ". . . The salient test of reversible error in instructions is whether the jury was misled to the extent of rendering a different verdict than it would have rendered, if the alleged errors had not occurred."

Black's Law Dictionary (4th Ed.) defines "preponderance" as:

> "Greater weight of evidence, or evidence which is more credible and convincing to the mind . . . . That which best accords with reason and probability . . . ."

In Peyton v. McCaslin, Okl., 417 P.2d 316 (1966), the Supreme Court of Oklahoma said:

> ". . . As the well-known axiom states, the preponderance of the evidence does not mean the greater number of witnesses testifying to a fact, but means that which, to the mind of the trier of the fact, or the seeker of the truth, seems most convincing and more probably true."

In the present case defendant argues that the instructions do "not make it clear to the jury that in the event the plaintiff fails to prove its contentions that in that event judgment should be rendered for the defendant." We do not agree with defendant's argument. The trial court made it very clear to the jury that they could render judgment for defendant if plaintiff failed "to prove its contentions" when the trial court gave Instruction No. 5, which reads in part as follows:

> "No. 5 BURDEN OF PROOF ON THE ISSUES.
>
> "The plaintiff has the burden of proving each of the following propositions: First: That there is now an amount due . . . . by Central Pump and Supply Company; Second: That at the time the indebtedness was incurred the defendant, Homer Johnson, was a partner with Monte Bunch and doing business as Central Pump and Supply Company.
>
> "If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. *If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.*" (Emphasis ours.)

We, therefore, hold that the trial court not only correctly stated the principles of law, but he did so in language and

form that persons of ordinary understanding could comprehend. It therefore follows the jury could not have been misled by the instructions to the extent of rendering a different verdict. Thus, the "salient test of reversible error in instruction" under Cramer, supra, has been passed.

Defendant's argument under his second proposition of error, that the trial court erred in giving Instructions No. 1 and No. 4 is therefore without merit. The remaining portion of defendant's second proposition of error, as it relates to Instruction No. 6, has been answered in the discussion of the foregoing two propositions of error and merits no further discussion. Having found that the trial court properly instructed the jury on the applicable principles of law, no error was committed in refusing defendant's requested instructions.

Judgment affirmed.

BRIGHTMIRE, P. J., and
NEPTUNE, J., concur.